

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1296

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against-

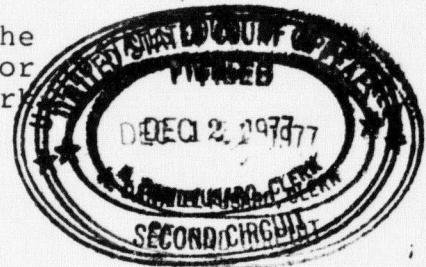
ALPHONSE BIFULCO,

Defendant-Appellant.

Docket No:
77-1296

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P/S

On Appeal From A Judgment of The
United States District Court For
The Eastern District of New York



REPLY BRIEF FOR DEFENDANT-APPELLANT BIFULCO

12/1/77
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALPHONSE BIFULCO,

Defendant-Appellant.

DOCKET NO. 77-1296
77-1297

REPLY BRIEF OF APPELLANT
ALPHONSE BIFULCO

On Appeal From A
Judgment of The United
States District Court for
The Eastern District of New York

Recognizing the paucity of the evidence of record, the Government has in several places in its Brief (hereinafter "Govt. Br., p. ") supplied evidence which in fact did not exist:

(1) For example, the Government states with respect to Thistlethwaite and McFarland: "To further their plans [after DeMaio's departure from their alliance] they combined their operation with appellant Alphonse Bifulco and his brother Mario in November 1975." (Govt. Br., p.4) This assertion is not supported by any citation to the record, but rather by the generality that "[T]he agreement among Thistlethwaite, McFarland, and the Bifulco brothers was shown through

the testimony of both Lawrence DeMaio and Roseann Polimeni." (Govt. Br., p. 4).

The testimony of DeMaio does not support the claim by the Government of a Thistlethwaite, McFarland and Bifulco brothers conspiracy; nowhere in that testimony is there any reference to a connection between McFarland and the Bifulcos. Nor does Polimeni's testimony support the Government's claim of a Thistlethwaite, McFarland and Bifulco brothers conspiracy. With respect to Thistlethwaite, she testified that she moved in with Thistlethwaite in December, 1975 and lived with him for about two weeks (872) and that "he was doing things with dust, selling dust" (872). But she further stated that while she was living with Thistlethwaite, Alphonse Bifulco never came to Thistlewaite's apartment while she was there (874); and that at most she had a conversation with Thistlethwaite about Mario Bifulco (874): "Me and Michael [Thistlethwaite] had talked about Mario, that he wanted Michael to make dust for him." (876)

Roseann's testimony, relied on by the government, may have linked Thistlethwaite to McFarland in December 1975 and January 1976 after she had broken up with Alphonse. The Government again, however, stretches even this evidence out of recognition: "She accompanied Thistlewaite and McFarland to purchase chemicals and overheard their plans to make large amounts of money through their [Thistlethwaite and McFarland] efforts." (Govt. Br., p. 5) This statement not only does not

implicate Alphonse Bifulco, but distorts Polimeni's testimony that while she, in fact, accompanied Thistlethwaite and McFarland to buy chemicals, there was some conversation but that she did not "recall the conversation" (891).

An examination of Polimeni's testimony reveals, at best, a number of isolated, illicit drug activities, not the single conspiracy alleged in the indictment.

(2) The Government asserts that Polimeni, Thistlethwaite and Alphonse Bifulco were arrested on September 1, 1975, while trying to buy angel dust; that a quantity of angel dust was found in the jacket pocket of Alphonse Bifulco; and that, despite the arrest, Polimeni continued to sell dust with Alphonse for another month. (Govt. Br., p. 12) The facts, as testified to by Polimeni, are: That on the evening of September 1, 1975, five persons including Alphonse Bifulco, Thistlethwaite and Polimeni were driving in a car (873); that they [Alphonse and Roseann] "met in the park and [they] did go in the car specifically to go and find some dust, [they] had some on [them] but [they] were looking to get some more" (850).

Polimeni's subsequent testimony clarifies who was looking for angel dust:

"Q. Now how do you know you were looking for dust?

A. I had spoken to Alphonse earlier that night.

Q. How about in the car, did you speak with anybody?

A. We were all talking to each other but not about that." (851) (Emphasis added.)

Thus, rather than evidencing an alleged conspiracy among Alphonse Bifulco, Polimeni and Thistlethwaite, it simply describes the Alphonse Bifulco-Polimeni relationship. No testimony involves the rest of the people in the car.

The Government's statement that Polimeni continued to sell dust with Alphonse for a month after their September 1975 arrest is not supported by the testimony. Polimeni testified that her drug dealings with Alphonse Bifulco stopped after the arrest (1162) and her cited testimony on page 871 is not to the contrary. Polimeni was asked:

"A. While you were living with him and after you were arrested did you continue to deal in angel dust?

A. Yes.

Q. And did you continue to smoke, to smoke it?

A. Yes (871, emphasis added)."

(3) The Government's summary of DeMaio's testimony to the effect of mixing crystals "so that Thistlethwaite could 'pay off' the Bifulcos" is also inaccurate. (Govt. Br., p.11, emphasis added.)

DeMaio said that he would help Thistlethwaite make the angel dust so that Thistlethwaite could pay off Mario (447); there was no mention of helping McFarland and no mention of Alphonse Bifulco. DeMaio stated that before Christmas, 1975, he went to McFarland's apartment where he mixed three pounds of crystals (847) and that there were a number of people in the apartment including McFarland and Mike Thistlethwaite and at least four others. (447). DeMaio testified that he mixed the crystals in McFarland's kitchen and was assisted by Thistlethwaite (448). Rather than mixing the crystals in the "presence of McFarland, Thistlethwaite and a few other people" (Govt. Br., p. 11), in fact the evidence is that only Thistlethwaite was present in the kitchen. McFarland and the other people "were in the next room" (448) and when DeMaio was asked whether he had any conversations with McFarland, he replied: "No, just general talk and I told Mike [Thistlethwaite] like this is it" (448).

It is apparent that the Government attempted, by its questioning at trial, to get DeMaio to implicate McFarland in the alleged alliance among Thistlethwaite and the Bifulco brothers, but DeMaio's response makes it clear that only Mike (Thistlethwaite) was involved on this occasion.

(4) In its Argument, the Government made a number of conclusory statements not supported by the evidence. For example, the Government states that the "evidence showed that" in November, 1975, Thistlethwaite's and McFarland's "dealings in

angel dust had already been started with two brothers, Alphonse and Mario Bifulco." (Govt. Br., p. 23) The evidence did not show that, see discussion p. 1 supra. Similarly, the Government's assertion, without record references, that "on DeMaio's testimony alone, the jury might reasonable [sic] have concluded that prior to DeMaio's meeting the Bifulcos, Thistlethwaite and McFarland had allied themselves with the Bifulcos in an angel dust operation" (Govt. Br., p. 24) is just not supported by any evidence adduced at trial. DeMaio only saw Alphonse with Mario and Thistlethwaite on one occasion and it is significant to note that no other mention was made of Alphonse by DeMaio, the latter having made crystals so Thistlethwaite could "pay off" Mario (447). Moreover, DeMaio's testimony never connected McFarland with Thistlethwaite and the Bifulcos.

(5) The Government's statement that "the evidence clearly linked Alphonse to other conspirators as early as September 1, 1975" is not correct. (Govt. Br., p.26) All the evidence showed was that Alphonse knew the alleged conspirators, see discussion on pages 2-3 supra. Certainly, with the evidence adduced at trial regarding Polimeni's relationships with various men, it can hardly be considered evidence of conspiracy that she "shared her sexual favors"

with four of the defendants. (Govt. Br., pp. 5, 28)

We agree with the Government that Alphonse Bifulco's claim is that he did not agree to deal in angel dust together with the other alleged conspirators. (Govt., Br., p.26) Whether the appellants deny or do not deny their individual involvement in buying chemicals or in selling angel dust is irrelevant; they were not charged with any substantive violations. They were indicated for conspiracy and the Government has not shown that they were all linked together in a common aim or vertically integrated arrangement.

The evidence adduced in this case is similar to that adduced in United States v. Miley, 513 F. 2d 1191 (2d Cir., 1975), which showed sporadic drug transactions involving defendants who did not know each other.

The Government attempts to contrast this case with others in which courts have found multiple conspiracies by simple conclusory statements; strokes of the pen rather than by reference to specific evidence. The Government states, the nature of the drug "angle dust" permits operations among small groups of people or individually. (Govt. Br., p.3) Theoretically, one would not need to associate himself with anyone else in order to manufacture and sell angel dust. Contrary to the Government's assertion, the evidence did not show beyond a reasonable doubt that all of the appellants joined together in the same objective: to make and sell angel dust. What the evidence did show was that the appellants individually, may have been involved in sporadic drug transactions.

The Government's reliance on United States v. Moten,
F. 2d Slip op. 5769 (2d Cir. September 6, 1977) is
misplaced. The facts in that case are totally dissimilar
to those in this case. Moten involved a large continuing
drug operation with "a group of importers or suppliers selling
on a regular basis to a core of well-financed middlemen who
in turn sell to another group of distributors who eventually
sell at retail ..." (Slip op. pp. 5775-76)

Furthermore, unlike the present case, the main co-
operating witness in Moten was in a position to know the
perimeters of the conspiracy. There is no evidence in the
present case that either DeMaio or Polimeni, who themselves
did not even know each other (1179-80), were "central to the
involvement of all". (Slip. op. p. 5777).

In an effort to boot-strap their position, the
Government has stated that "the jury could have considered
Alphonse Bifulco's post-arrest statements as circumstantial
evidence of guilt. (Govt. Br., pp. 36-37) This statement is
true as far as it goes. In United States v. Johnson, 513 F. 2d
819 (2d Cir. 1975) this Court in reversing a conviction of
conspiracy and importation of methamphetamine stated:

"While false exculpatory statements made
to law enforcement officials are circum-
stantial evidence of a consciousness of
guilt and have independent probative force
(citations omitted), this Circuit ... has
held that falsehoods told by a defendant in
the hope of extricating himself from sus-
picious circumstances are insufficient proof

on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt." 513 F. 2d at 824.

Thus, in summary we dispute the Government's conclusory statement that "the overwhelming evidence in this case showed that the appellants were closely linked in a single conspiracy to manufacture and sell angel dust." We submit that the evidence failed to show any such "closely linked" conspiracy, or indeed any conspiracy such as charged in the indictment at all.

Dated: New York, New York
December 12, 1977

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON PERSON IN CHARGE-297
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

H. J. BROWN & CO., INC., PUBLISHERS, NEW YORK
21 ELDER STREET 22 EAST 41ST STREET

UNITED STATES OF AMERICA,

Appellee
~~Plaintiff~~

against

Affidavit of Service on Person in Charge

ALPHONSE BIFULCO, et al.,

Appellants
~~Defendant~~

State of New York

County of New York

} ss.:

MICHAL BOBRYK,

being duly sworn, says that he is above the age of twenty-one years; that on the 12th day of December 1977 between the hours of 1:00 P. M. and 5 P. M., he served the annexed Brief of Defendant-Appellant Alphonse Bifulco on DAVID G. TRAGER the Attorney for the Eastern District of N. Y. in the above entitled action, at his office, No. 225 Cadman Plaza East, in the City of Brooklyn, N. Y. by delivering a true copy of the same to and leaving the same with person in charge of said office, ~~and Attorney xxxxxx~~ ~~xxxxxx at the time of said service~~

Sworn to before me, this 12th day
of December 1977 }

Robert A. Perkins

Michael Bobryk

MICHAL BOBRYK

ROBERT A. PERKINS
Notary Public, State of New York
No. 41-187-120-1, Queens County
Certificate filed in New York County
Commission Expires March 26, 1978

